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No. 98-492

In The
Supreme Court of The United States
October Term 1997

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., et al.
Petitioners,

v.

GERALD KOBELL, Regional Director for Region Six of the National Labor Relations Board for and on behalf of THE NATIONAL LABOR RELATIONS BOARD
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. SCOPE OF REPLY

This Reply Brief addresses only the new issue that the National Labor Relations Board ("Board") raises with respect to mootness.[1] For the reasons discussed herein, the expiration of the underlying injunction does not make the Petition moot. The expired injunction has collateral consequences that are harmful to Petitioner. Moreover, the issues raised in this case are capable of repetition yet evading review by this Court.[2]

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[1] The Opposition Brief states at several points (pp. 5 and 8) that the Union's strike was an "unfair labor practice strike" entitling strikers to immediate reinstatement at the end of the strike. The Board's Brief fails to note, however, that this obligation to immediately reinstate strikers does not apply if the strike itself was illegal under Section 8(g). NLRB v. Washington Heights-West Harlem-Inwood Mental Health Coun. 897 F.2d 1238, 1247-48 (2nd Cir. 1980).

[2] As an alternative ground for mootness, the Opposition Brief notes that Beverly has agreed to reinstate strikers in a manner consistent with the 10(j) injunction regardless of the outcome of this litigation. The "capable of repetition yet evading review" doctrine and the "collateral consequences" doctrine apply with equal force to this alternative ground for mootness. Accordingly, it is not necessary to separately address that argument.

II. THIS CASE IS NOT MOOT SINCE THE EXPIRED PRELIMINARY INJUNCTION HAS COLLATERAL CONSEQUENCES THAT CAN SERIOUSLY INJURE PETITIONER.

The District Court's preliminary injunction expired by its terms on May 4, 1998, but the expiration of that Order does not moot this Petition. This Court has long recognized that, even when the underlying proceeding has run its course and no further relief can be awarded, the underlying court order may have collateral consequences that extend the life of the "controversy." In numerous cases, the Court has noted that the "possibility" of collateral consequences from a court order is sufficient to keep a controversy from being moot. Sibron v. State of New York, 392 U.S. 40, 88 S. Ct. 1889 (1968) (criminal conviction); Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 94 S. Ct. 1694, 1698-99 (1974) (collateral impact on subsequent relations with union); City of Los Angeles v. Lyons, 461 U.S. 95, 101, 103 S. Ct. 1660, 1664-65 (1983) (civil rights action).

In the present case, the most obvious collateral consequence is the risk that the Board might initiate civil contempt proceedings against Beverly for alleged non-compliance with the reinstatement provisions of the preliminary injunction. The Board has notified Beverly on repeated occasions that the Board believes Beverly has not fully complied with the reinstatement provisions of the underlying preliminary injunction [Appendix pp 1-19]. While the Board's latest letter asserts that the Board does not "intend to pursue these issues in a contempt proceeding before Judge Smith" (Apdx. p. 19), there is nothing binding about this "intention" and the Board could initiate contempt proceedings

at any time.[3] This collateral consequence is certainly "possible", Sibron, 392 U.S. at 55, 88 S. Ct. at 1898-99, and is "capable" of occurring. Honig v. Doe, 484 U.S. 305, 318-319, n. 6, 108 S. Ct. 592, 601-602, n. 6 (1988).

The expired order also can adversely impact Petitioner in pending proceedings before the Board and the Courts of Appeals. Although a 10(j) injunction is not an adjudication of whether any unfair labor practice occurred, the Board in past cases has used the existence of a successful 10(j) order as evidence of employer animus or as evidence that the employer's alleged misconduct was serious in nature.[4] This is a particularly sensitive issue for Petitioner since the Board is in the process of seeking to impose an unprecedented nationwide cease-and-desist order applicable to all of the approximately 750 facilities owned and operated by Beverly. In 1993, the Board ordered precisely this relief because of the

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[3] A civil contempt proceeding can be initiated after the date that a Court order expires so long as the contempt proceeding is based on violations that allegedly occurred during the life of the underlying order. Reliance Ins. Co. v. Mast Const. Co., 84 F.3d 372, 376 (10th Cir. 1996) and cases cited therein. In some cases, the Board has sought contempt years after the date the preliminary injunction was initially entered. E.g., Szabo v. U.S. Marine Corp., 819 F.2d 714 (7th Cir. 1987) (seeking contempt in 1986 based on a preliminary injunction issued in May 1984).

[4] E.g., Fry Foods, Inc., 256 NLRB 137, 138 (1981); Seminole Intermodal Transport, Inc., 312 NLRB 236, 237 n. 3 (1983); American Commercial Lines, Inc., 291 NLRB 1066, 1071, n. 21, 1072 (1988).

Board's misperception that Beverly had a "proclivity to violate the Act." Beverly California Corp., 310 NLRB 222, 228 (1993). Even after the Court of Appeals for the Second Circuit denied enforcement to this nationwide order and affirmatively found no evidence of "an anti-union animus amounting to a proclivity to violate the Act",[5] the Board has persisted in its effort to brand Beverly as a recidivist employer whose conduct warrants a nationwide remedial order. See Beverly California Corp., 326 NLRB No. 29 (1998) (appeal pending 3rd Circuit) and Beverly California Corp., 326 NLRB No. 30 (1998) (appeal pending 7th Circuit). Moreover, the Board seeks the same order in the present administrative proceeding which is still pending before the Board. If the preliminary injunction in the present case is reversed and vacated, the Board will be unable to rely upon the injunction as support for such an extraordinary order.

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[5] Torrington Extend-A-Care Employee Association v. NLRB, 17 F.3d 580, 586 (2nd Cir. 1994). The Court concluded, in relevant part, "the proof in many cases, while sufficient to support the decision, was ambiguous, and contrary decisions would have been has sustainable. Non-hallmark violations at 3% of a Company's facilities does not show an antiunion animus amounting to a proclivity to violate the Act. Nor was there a showing that the unfair labor practices stemmed from a corporatewide labor policy . . . .[T]he only centrally coordinated labor policy shown in this case was Beverly's admitted -- and legal -- policy of opposing unionization at its facilities . . . by and large, the presence of divisional personnel in union campaigns at individual facilities appears to have had a positive effect, and Beverly should not be punished merely because isolated unfair labor practices occurred when division personnel were present. Id., at 586-87.

III. THE PETITION ALSO IS NOT MOOT SINCE THE UNDERLYING ISSUE IS CAPABLE OF REPETITION INVOLVING THE SAME PARTIES BUT MAY EVADE REVIEW BECAUSE OF THE INHERENTLY SHORT DURATION OF A PRELIMINARY INJUNCTION.

This Court has never issued a decision construing or applying Section 10(j) of the Act, and the reason why is obvious. Section 10(j) preliminary injunctions are, by their very nature, of short duration, expiring when the Board issues its administrative determination. Here, the injunction expired even earlier than usual because Third Circuit precedent requires a district court to limit the duration of a preliminary injunction to six months, plus extensions of limited duration in unique circumstances. Eisenberg v. Hartz Mountain Corp., 519 F.2d 138, 144 (3rd Cir. 1975). Given these limitations, it would be virtually impossible for a 10(j) preliminary injunction to be in effect by the time the matter makes its way to this Court through the ordinary processes.[6] Miller v. California Pacific Medical Center, 19 F.3d 449, 453 (9th Cir. 1994) (finding issues raised by an expired 10(j) injunction to be not moot). See also, Eisenberg v. Holland Rantos Co. Inc.,

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[6] In this particular case, of course, Beverly took every step it could to get this matter to this Court at an earlier stage through a motion to the Court of Appeals for the Third Circuit to stay the injunction pending appeal, and a subsequent application to this Court for a stay pending appeal (Apdx. A-1), each of which was denied.

583 F.2d 100, 103, n. 6 (3rd Cir. 1978).

It is precisely for this reason that this Court has recognized that "jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is 'capable of repetition, yet evading review'." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546, 96 S. Ct. 2791, 2797 (1976) quoting from Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S. Ct. 279, 283 (1911). The "capable of repetition, yet evading review" doctrine applies when: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Weinstein v. Bradford, 423 U.S. 147, 149, 96 S. Ct. 347, 349 (1975). The term "reasonable expectation" of recurrence does not require proof that repetition is "more probable than not." Honig v. Doe, supra, 484 U.S. at 318-319, n. 6, 108 S. Ct. at 601-02, n. 6. "Our concern in these cases, as in all others involving potentially moot claims, [is] whether the controversy [is] *capable* of repetition." Id. (emphasis added) and cases cited therein.

Given the scope of Beverly's operations nationwide, the underlying controversy plainly is "capable" of repetition. Indeed, this precise conflict may occur at the individual locations that are involved in this litigation when the collective bargaining agreements that cover those locations expire in 2001. Neither the Board, the Union nor Beverly has changed its views regarding Section 8(g) of the Act. Moreover, there is no assurance that the Board will have issued its administrative decision by the date the current

contract expires or that the Board's decision would be reviewed by a Court of Appeals before that date.[7]

The Court has recognized in past cases that labor issues involving strikes, collective bargaining agreements and management-labor issues are capable of repetition between the same parties when the next round of collective bargaining or voting occurs. Burlington Northern R. Company v. Brotherhood of Maintenance of Way Employees, 481 U.S. 429, 436 n. 4, 107 S. Ct. 1841, 1846 n. 4 (1987) (strike in connection with contract negotiations); Super Tire Engineering Co. v. McCorkle, supra, 416 U.S. at 125-127, 94 S. Ct. 1700-01 (strike following contract expiration);

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[7] If the Board's past history is any guide, it may even be fair to say that it is *likely* that Court of Appeals review of this administrative matter will not be finalized until well beyond the year 2001. As part of its strategy for justifying a nation-wide cease and desist order, the Board has stockpiled several years worth of charges and then issued a single complaint tying together unrelated, geographically separate facilities with diverse issues that are factually and legally complex. The result in Beverly California Corp., 310 NLRB 222 (1993) was a delay of more than three years between the administrative law judge's recommended decision and the Court of Appeals' subsequent denial of the Board's corporatewide order. In Beverly California Corp., 326 NLRB No. 29, there was a delay of more than four years between the administrative law judge's recommended decision and the Board's decision, and no briefing schedule has yet been set in the applicable Court of Appeals. Similarly, in Beverly California Corp., 326 NLRB No. 30, there was a delay of more than three years between the administrative law judge's recommended decision and the Board's decision, and that matter, too, has not been set for briefing in the applicable Court of Appeals.

International Organization of Masters, Mates & Pilots v. Brown, 498 U.S. 466, 473-74, 111 S. Ct. 880, 885-86 (1991) (distribution of campaign literature during union election).[8] "The burden of demonstrating mootness 'is a heavy one'", and this burden must be carried by the party asserting the applicability of the mootness doctrine. Los Angeles County v. Davis, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383 (1979) quoting from U.S. v. W.T. Grant Co., 345 U.S. 629, 73 S. Ct. 894, 897 (1953). The Board cannot meet this burden with respect to the particular nursing homes that are a part of this case, and the Board even more clearly cannot meet this

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[8] The cases relied upon by the Board in its Opposition Brief are entirely inapposite. In Local No. 8-6, Oil, Chemical & Atomic Workers Intern. Union v. Missouri, 361 U.S. 363, 370, 80 S. Ct. 391, 396 (1960) the court's decision to decline review was guided by the fact that the Court was being called upon to decide a constitutional issue and, since the underlying order had expired, it could avoid the constitutional issue and vacate the judgment of the Supreme Court of Missouri without having to address the merits. In University of Texas v. Camenisch, 451 U.S. 390, 393, 101 S. Ct. 1830, 1833 (1981), the student in question had graduated by the time the action reached the Court; thus, no party contended that the matter was capable of repetition between the same parties, nor were there any collateral consequences associated with the underlying order. In McLeod v. General Elec. Co., 385 U.S. 533, 535, 87 S. Ct. 637, 639 (1967), the Court did *not* hold that the matter was moot. The Court remanded the matter to the district court so that the district court could have the first opportunity to consider the impact of a supervening event upon the appropriateness of injunctive relief. Id. The Court never reached the issues of whether the preliminary injunction had collateral consequences for the employer or whether the matter was capable of repetition, yet evading review.

burden with respect to the approximately 730 other locations at which this same issue between Beverly and the NLRB may recur.

Perhaps most importantly, the Board would not meet its burden even if it could show that this particular labor dispute between Beverly and the Union was not likely to recur. The "issue" presented in the Petition concerns the appropriate legal standard in 10(j) cases, and that issue is likely to recur no matter what future dispute causes the Board to initiate 10(j) proceeding against Beverly. Miller v. California Pacific Medical Center, supra, 19 F.3d at 454 (finding that a dispute over the proper legal standard in 10(j) proceedings was an issue capable of repetition between the same parties, yet evading review.)

The probability of recurrence is enhanced by the Board's special focus on Beverly and the Board's misperception that Beverly has a proclivity to violate the Act. This Court has recognized in the past that a "reasonable expectation" of a matter recurring is greater if an administrative agency has a past litigation history with the adverse party. S.E.C. v. Sloan, 436 U.S. 103, 109-110, 98 S. Ct. 1702, 1707 (1978) (finding no mootness since the business in question had been repeatedly targeted by the administrative agency).

IV. CONCLUSION

The Brief *Amici Curiae* of LPA and The American Trucking Association Inc. (p. 19) noted that the Board has vastly increased its use of Section 10(j) in the past four years, and enormous time is being spent by the courts debating the appropriate legal standard for review. In the present case, for example, it took nearly nine months for the District Court to make a decision regarding this "emergency" matter. In McLeod v. General Electric Co., 385 U.S. at 535, 87 S. Ct. at 639, the Court remanded the case to the district court because "[w]e do not think it appropriate . . . to decide at this time the proper construction of Section 10(j)." Now, however, the differing positions on this fundamental issue have been fully developed by the Courts of Appeals, who remain divided on what is, without a doubt, the most fundamental and critical issue in any injunction proceeding -- namely, the legal standard that serves as the basis for the court's decisionmaking process. Petitioner respectfully submits that this case is the proper vehicle for addressing this issue.

Respectfully submitted,

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Attorneys for Petitioner
January 30, 1999

APPENDIX

July 9, 1997

Re: BEVERLY ENTERPRISES, INC. et al.
Case 6-CA-27873

Hugh Reilly, Esquire
Chief Counsel for Labor and Employment
Beverly Enterprises, Inc.
5111 Rogers Avenue
Fort Smith, AR 72919

Dear Mr. Reilly:

As I have indicated in our recent telephone conversation, we are continuing our review of the Employer's compliance with Judge Smith's Order of April 4, 1997. This office is in the process of contacting the alleged discriminatees who have indicated that they have not yet been fully reinstated, and I hope to have a summary of the results of that effort in the near future.

One area of dispute which should be addressed at this point involves strikers who were reinstated prior to the issuance of Judge Smith's Order to positions or schedules different from their pre-strike status and who subsequently resigned their employment. The various Unions have provided this office with a list of such employees who have not received

subsequent offers of employment to their pre-strike positions following the issuance of Judge Smith's Order. Although we have not completed the process of contacting these individuals to determine the facts, I have listed the name of each individual under the respective home below in order to give you an opportunity to address this matter.

Caledonia Manor	**Carpenter Care Center**	**Mt. Lebanon Manor**
Charlotte Furman	Deborah Graham	Sandra Davis
	Karen Russell	Christina Fries
Beverly Manor-Monroeville	**Wm. Penn Nursing Center**	**Meyersdale Manor**
Patricia Northern	Denise Fultz	Edith Hutzell
Lod Stover	Robin Groce	
	Debbie Grubb	
	Josie Grubb	
	Glenn Kahley	
	Kimberly Kick	
	Janice Reed	
	Laurie Romig	
	Jeannette Solt	
	Tracy Steel	

Meadville Care Center	**Beverly Manor of Reading**	**Beverly Manor of Lancaster**
Barbara Ensworth	Alesia Drexel	Norma Flores
Shannon Mattis	Stephanie Mohring	

As you know, it is this Region's position that employees who were reinstated but not to their pre-strike position and who subsequently were forced to resign their employment are entitled to new offers of reinstatement in accordance with Judge Smith's Order. Please provide this office with your position regarding this issue.

In this regard, it is also requested that you supply this office with information as to the specific individuals named above so that we may determine whether factual issues exist. Therefore, it is requested that you provide us with a summary for each individual named herein which would include the individual's pre-strike position, including classification, department, assignment, schedule, status and wage rate; the same information regarding the terms and conditions of the pre-injunction offer of reinstatement including the date of actual reinstatement; the date and the circumstances surrounding the individual's resignation; and the same specifics relative to any reinstatement offers made to any of these individuals subsequent to Judge Smith's Order.

Of course, it may become necessary to examine the Employees records regarding these and other discriminatees. Please feel free to telephone me to discuss this matter at 412/395-6899. Your prompt attention to this request will be appreciated.

Very truly yours,

/s/ John P. O'Connell

John P. O'Connell

Compliance Supervisor

Letter from: National Labor Relations Board dated 7/9/97

Appendix 4

September 22, 1997

Re: BEVERLY ENTERPRISES, INC., et al.
Case 6-Ca-27873

Hugh Reilly, Esquire
Chief Counsel For Labor and Employment
Beverly Enterprises, Inc.
5111 Rogers Avenue
Fort Smith, AR 72919

Dear Mr. Reilly:

Since the issuance of Judge Smith's Order on April 4, 1997, this office has engaged in a comprehensive investigation with respect to the actions the Employer has undertaken in its efforts to comply with said Order. Initially, over 650 questionnaires were mailed to the affected strikers state-wide and, subsequently, this action was followed by another mass mailing of over 250 supplemental questionnaires to similar individuals in order to assist this office in determining whether Beverly Enterprises was in full compliance with said Order. A significant number of Regional office staff personnel then contacted a number of individuals who had indicated through their responses that they believed they had not been fully restored to the positions of employment they had held prior to the strike. Numerous additional allegations of non-compliance raised by the Charging Party Unions were

also investigated.

Moreover, on July 9, 1997, I sent to your attention written correspondence specifically identifying individuals, whose names had been provided to this office by the Charging Party Unions, as employees who allegedly had been reinstated to positions or schedules different from their pre-strike status and who subsequently resigned their employment. At that time, I had requested that you provide this office with information the company had in its possession on these individuals in an effort to expedite the investigation of all issues raised because of the large number of alleged matters indicating non-compliance. On July 14, 1997 you responded to my July 9 letter by informing me that you preferred to be apprised of the specifics of each individual's claim before you provided a response.

Based on this extensive investigation, I believe that there are two areas where it appears that the Employer may be in non-compliance with Judge Smith's Order by its failure to fully restore discriminatees to their pre-strike positions. The first area involves the same class of individuals that I had raised as a concern in my July 9 correspondence; these are employees who were reinstated to positions or schedules different from their pre-strike status and who subsequently resigned their employment, all of which occurred prior to the issuance of said Order. The second area of concern involves individuals

who have been reinstated and who continue to be employed but under conditions different than what they had experienced prior to the strike.

There are seven individuals in the first class and the specifics of their claim are listed below:

1. NORMA FLORES -- Beverly Manor Lancaster Prior to walkout work schedule consisted of 64 hours per pay period. Reinstated in 1996 to a reduced work schedule of 32 hours per pay period. Forced to resign due to inability to meet financial obligations on reduced income.

2. MELINDA EAKEN -- William Penn (Lewistown) Prior to walkout employed on full-time schedule consisting of 75 hours per pay period and assigned to 7:00 A.M. to 3:00 P.M. shift.

   Reinstated in September, 1996 to part-time position consisting of 32 hours per pay period. Granted medical leave of absence and returned to part-time position in February, 1997.

   Bid on full-time position on 3:00 P.M. to 11:00 P.M. shift.

   Forced to resign in March, 1997 due to child care problems related to employment on 3:00

P.M. to 11:00 P.M. shift.

3. BARBARA ENSWORTH -- Meadville Care Center

   Prior to walkout employed on full-time schedule consisting of 60 -- 75 hours per pay period.

   Reinstated in April, 1996 to part-time position consisting of 16 hours per pay period.

   Forced to resign in June, 1996 due to inability to meet financial obligations on reduced income and loss of insurance benefits.

4. VICKY WEIKAL -- Meadville Care Center

   Prior to walkout employed on full-time schedule in South Wing.

   Reinstated in September 1996 to full-time schedule in East Wing.

   Forced to resign in September, 1996 due to more onerous working conditions.

5. CHRISTINA NOVAK -- Mt. Lebanon Manor

   Prior to walkout employed on a part-time schedule. Reinstated in April, 1996 to a casual position.

   Forced to resign in October, 1996 due to uncertainty of work schedule and loss of insurance benefits.

6. DEBORAH GRAHAM -- Carpenter Care Center (Tunkhannock)

Prior to walkout employed on a full-time schedule. Reinstated in April, 1996 to part-time schedule. Forced to resign in July, 1996 due to inability to meet financial obligations on reduced income and loss of insurance benefits.

7. KAREN RUSSELL -- Carpenter Care Center (Tunkhannock)

Prior to walkout employed on a full-time schedule consisting of approximately 75 hours per pay period.

Reinstated in October, 1996, to part-time schedule with a reduced wage rate and alternate shift assignment.

Forced to resign in February, 1997 due to inability to meet financial obligations on reduced income.

There are ten individuals in the second class and the specifics of their claim are listed as follows:

1. MELISSA DANIELS -- Fayette Health Care

Prior to walkout assigned to 7:00 A.M. -- 3:00 P.M. shift on weekends.

Reinstated in May, 1997 to former job but assigned to other shifts on weekends. Replacement employees working 7:00 A.M. to 3:00 P.M. weekend shifts

2. ANDREA HRISCISCE -- Fayette Health Care

Prior to walkout regularly assigned to work five days per pay period. In addition, assigned additional hours as fill-in.

Returned to work after walkout. No longer regularly assigned five days per pay period or additional hours as fill-in.

Replacement employees working fill-in hours.

3. CONSTANCE KREELICH -- Fayette Health Care

Prior to walkout assigned to bid job in E-Wing.

Reinstated in April, 1997 to former job but assigned to B-Wing.

B-Wing assignment more onerous than E-Wing.

4. JOY KAHLEY -- William Penn Nursing Center (Lewistown)

Prior to walkout assigned as part-time employee in laundry.

Reinstated in May, 1997 as casual employee. Has worked one day since reinstatement. Replacement employees working in laundry.

5. SANDY KRATZER -- William Penn Nursing Center (Lewistown)

Prior to walkout employed on a part-time schedule consisting of 30 to 80 hours per pay

period.

Reinstated to casual position assigned reduced hours.

Replacement employees working in her classification.

6. TRACIE MCCARTLE -- William Penn Nursing Center (Lewistown)

For a significant period prior to walkout employed on a full-time schedule consisting of 60 to 75 hours per pay period.

Immediately prior to walkout assigned to a part-time schedule due to maternity complications.

Reinstated in May, 1997 to part-time hours.

No longer experiencing maternity problems.

7. SHARON DRAGOVICH -- Beverly Manor Reading

Prior to walkout employed as a part-time dietary aide assigned to same schedule for a five year period.

Reinstated to same number of hours but assigned to all different shifts.

The irregularity of current schedule causing hardship on family life.

8. IRENE SUMAN -- Beverly Manor Monroeville

Prior to strike walkout regularly scheduled to

work 50 hours per pay period in laundry but assigned additional hours in housekeeping. Reinstated to same number of hours in laundry but no longer assigned to additional hours in housekeeping.

Replacement employees being assigned housekeeping hours.

9. DAWN KISNER -- Carpenter Care Center (Tunkhannock)

Prior to walkout regularly assigned to Blue Wing.

Reinstated to Green Wing.

The change in wings requires her to work under more onerous conditions.

10. HARRY SICKLER -- Carpenter Care Center (Tunkhannock)

Prior to walkout regularly assigned to Gold Wing.

Reinstated to Blue Wing.

The change in Wings requires him to work under more onerous conditions.

Replacement employee assigned to Gold Wing.

Despite your unwillingness to provide your position regarding the status of the individuals named in my earlier correspondence, this office has been able to significantly

reduce the number of individuals in the first class whose status remain an issue.

It is requested that you respond to the claims of non-compliance no later than Monday, September 29, 1997 so that we may expeditiously bring to a close the issue of whether or noncompliance with Judge Smith's Order has been fully achieved. I welcome your response. It is the intention of this office to submit all unresolved issues of alleged non-compliance to our Division of Advice.

Your prompt and immediate attention to this matter is appreciated.

Very truly yours,
Very truly yours,
/s/ John P. O'Connell
John P. O'Connell
Compliance Supervisor

Letter from: National Labor Relations Board dated 9/22/97

October 14, 1997

Re: BEVERLY ENTERPRISES, INC., et al.
Case 6-CA-27873

Hugh Reilly, Esquire
Chief Counsel for Labor and Employment
Beverly Enterprises, Inc.
5111 Rogers Avenue
Fort Smith, AR 72919

Dear Mr. Reilly:

This is in reference to my letter dated September 22, 1997.

One individual who was inadvertently left off the list in the "second class" of individuals is Kimberly Milliken from the Franklin Care Center located in Waynesburg, PA. Her particulars are as follows:

Prior to walkout, assigned as part-time employee in the Laundry/Housekeeping Department. In addition, assigned additional hours as fill-in and normally worked 40 to 55 hours every two weeks.

Reinstated in June, 1996, as casual employee and assigned reduced hours.

Replacement employee Crystal Rajinovic continues to work hours in the Laundry/Housekeeping Department and assumes hours that Milliken normally would work.

Your prompt response to this claim of non-compliance will be appreciated.

Very truly yours,
/s/ John P. O'Connell
John P. O'Connell
Compliance Supervisor

Letter from: National Labor Relations Board dated 10/14/97

October 27, 1997

Re: BEVERLY ENTERPRISES, INC. et al.
Case 6-CA-27873

Hugh Reilly, Esquire
Chief Counsel for Labor and Employment
Beverly Enterprises Inc.
5111 Rogers Ave.
Fort Smith, AR 72919

Dear Mr. Reilly:

On October 14, 1997, I sent correspondence to your attention by both fax and regular mail with respect to the particulars regarding Kimberly Milliken who is employed by the Franklin Care Center located in Waynesburg, Pa. and was inadvertently left off the list in the "second class"of individuals, I had asked for your prompt response to this claim of non-compliance. To date I have not received your response to my inquiry.

I would appreciate it if you would provide me with your written response with respect to Ms. Milliken as soon as possible, but no later than Tuesday, October 28, 1997.

Your immediate attention to this matter will be appreciated.

Very truly yours,
/s/ John P. O'Connell
John P. O'Connell
Compliance Supervisor

Letter from: National Labor Relations Board dated 10/27/97

Appendix 17

November 12, 1997

Re: BEVERLY ENTERPRISES, INC., et al.
Case 6-CA-27873

Hugh Reilly, Esquire
Chief Counsel For Labor and Employment
Beverly Enterprises, Inc.
5111 Rogers Avenue
Fort Smith, AR 72919

Dear Mr. Reilly:

This office has completed its investigation and review of Beverly's efforts to fully comply with the reinstatement Order issued by Judge Smith on April 4, 1997. We believe there are five individuals who still have not been fully reinstated and, as a result, gross backpay continues to accrue on their behalf.

Discriminatees Barbara Ensworth (Meadville Care Center) and Karen Russell (Carpenter Care Center) were reinstated to positions or schedules that were different from what they had experienced prior to the April, 1996 walkout and voluntarily quit prior to Judge Smith's Order. It is the Region's position that these two individuals have never been offered full reinstatement. Thus, any backpay due them has not been tolled.

Discriminatees Andrea Hriscise, Julie McFadden and Twyla Ramage have been restored to their regular part-time hours at Fayette Health Care Center but have been consistently denied additional fill-in hours they had been assigned prior to the walkout. These fill-in hours are regularly assigned to two replacement housekeeping employees who remain employed at the Fayette facility. It is our position that these three individuals have not been fully reinstated and any fill-in hours being assigned to the two replacement employees would accrue as backpay due these individuals.

Although we believe these five individuals have not been fully restored in compliance with Judge Smith's Order, we do not intend to pursue these issues in a contempt proceeding before Judge Smith. However, we fully intend to litigate these matters in a future backpay proceeding should this Agency prevail in the underlying ULP litigation. Of course, nothing precludes Respondent from taking remedial actions at this time to toll accrual of additional backpay.

If you have any questions regarding this matter, please contact me at 412/395-6899.

Very truly yours,

/s/ John P. O'Connell

John P. O'Connell

Compliance Supervisor

Letter from: National Labor Relations Board dated 11/12/97